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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

GERALD MCGUIRE, Plaintiff and Appellant, v. BOB LAWTON, ET AL., Defendants and Respondents.	A152468 (Humboldt County Super. Ct. No. DR120136)

Gerald McGuire appeals from a judgment dismissing his wrongful foreclosure action against Bob Lawton, Steven Sellers and Paul Byrer (Lenders) because he failed to bring his case to trial within five years after the action was commenced. (Civ. Proc. Code § 583.310.)[1] McGuire contends the trial court miscalculated the five-year period by refusing to exclude time when he was represented by an attorney who allegedly failed to prosecute his case. According to McGuire, during that period of time, "[b]ringing the action to trial . . . was impossible, impracticable, or futile." (§ 583.340 subd. (c).) We reject this contention and affirm the judgment.

I. The Five-Year Dismissal Statute

Under section 583.310, "[a]n action shall be brought to trial within five years after the action is commenced against the defendant." "Absent a qualifying stipulation to 'extend the time within which an action must be brought to trial' under section 583.330,

[1] Subsequent statutory references are to the Code of Civil Procedure, unless otherwise indicated.

or tolling of the allowed five-year period, dismissal of an action that has not reached trial at the end of five years is mandatory under section 583.360. Under the press of this statutory requirement, anyone pursuing an 'action' in the California courts has an affirmative obligation to do what is necessary to move the action forward to trial in timely fashion." (*Tanguilig v. Neiman Marcus Group, Inc.* (2018) 22 Cal.App.5th 313, 322 (*Tanguilig*).)

Under section 583.340, subdivision (c), the computation of the time within which an action must be brought to trial does not include time periods when, for any reason, "[b]ringing the action to trial . . . was impossible, impracticable, or futile." "Section 583.340 is construed liberally, consistent with the policy favoring trial on the merits. [Citation.] Because the purpose of the dismissal statute 'is to prevent avoidable delay, . . . [section 583.340, subdivision (c)] makes allowance for circumstances beyond the plaintiff's control, in which moving the case to trial is impracticable for all practical purposes.' " (*Tanguilig, supra*, 22 Cal.App.5th at p. 323, italics omitted.)

"Appellate review of a trial court's determination of whether section 583.310 was tolled for impossibility, impracticability, or futility is limited. This is because trial courts are best equipped to evaluate the complicated factual matters that could support such a finding. [Citation.] We therefore review a trial court's tolling decision for abuse of discretion, giving it the usual deference accorded by that standard, and reversing only if no reasonable basis exists for the trial court's decision. [Citations.] In the absence of an abuse of discretion, we will affirm even if we would have ruled differently." (*Tanguilig, supra*, 22 Cal.App.5th at p. 324.)

II. Background[2]

McGuire initiated this action as a pro per litigant and subsequently filed three substitution of attorney forms while the case was pending below. To facilitate our

[2] In both of his appellate briefs, McGuire requests that this court "take judicial notice of all the court records, transcripts, minute orders, documents, and proceedings in this matter; and, in particular, the *Humboldt County Register of Actions*." We deny these requests because McGuire failed to comply with the procedure for requesting judicial

review, we divide our background summary into phases that correspond with the person who was representing McGuire at the time.

A. McGuire's Pro Per Lawsuit

In February 2012, McGuire filed a complaint against Lenders and others, seeking damages for fraudulent lending practices. The following April, he filed a motion for preliminary injunction and temporary restraining order to prevent foreclosure of properties securing his loans. Lenders demurred to the complaint and opposed the motion to prevent foreclosure. Hearings on the motions were continued several times.

Meanwhile, McGuire appeared at a July 2012 case management conference accompanied by attorney Andrew Stunich, who stated that he would be substituting in as counsel of record and was in the process of preparing a first amended complaint. Accordingly, the case management conference was continued.

On July 5, 2012, McGuire filed a pro per first amended complaint purporting to state causes of action for wrongful foreclosure, unfair business practices, breach of fiduciary duty and intentional infliction of emotional distress.

B. Stunich's Representation of McGuire

On July 17, 2012, McGuire filed a substitution of attorney form, substituting Stunich as his attorney of record. That same day, Stunich appeared at a case management conference where McGuire's motion for a preliminary injunction was withdrawn and the demurrer to McGuire's original complaint was dropped. Over the next year, Stunich opposed a demurrer and motion to strike the first amended complaint; filed a second amended complaint; negotiated with opposing counsel regarding alleged deficiencies in the second amended complaint; and filed a third amended complaint in July 2013.

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notice prescribed by rule 8.252(a) of the California Rules of Court, which requires a separate motion accompanied by a proposed order and copies of material to be noticed. We note that the Register of Actions and many court documents are already part of the record. However, McGuire did not include transcripts of any hearing or proceeding in his designation of the record on appeal.

In November 2013, Lenders filed a case management statement, which reported the following developments: McGuire's properties securing his loans from Lenders had been sold at trustee sales. McGuire's third amended complaint had not been served on Lenders, but the parties stipulated that once McGuire filed errata or a fourth amended complaint, Lenders would have 30 days to answer. The parties had exchanged discovery and McGuire gave his deposition. McGuire had settled his claims against two other defendants (the settling defendants).

In December 2013, the settling defendants provided McGuire with a proposed settlement agreement. However, in May 2014, the settling defendants reported to the court that their settlement was not yet final because Stunich was having trouble communicating with McGuire. The appellate record does not discuss the reason Stunich and McGuire were having problems, although Stunich told the settling defendants that McGuire had failed to attend a March 6, 2014 appointment with Stunich. Whatever the issue, it did not prevent Stunich from executing a stipulation that a good faith settlement had been reached with the settling defendants. In September 2014, Stunich filed a request for dismissal as to these defendants on behalf of McGuire.

Another case management conference was set for November 2014. Lenders filed a statement indicating that McGuire had yet to file errata to the third amended complaint or a fourth amended complaint. Lenders stated that in any event they intended to file another demurrer and motion to strike because McGuire could not allege a valid truthful claim against them. Lenders believed that McGuire's deposition testimony, interrogatories propounded by both sides, and responses to document production demands proved that McGuire could not state a valid cause of action because there was no wrongdoing by the defendants and McGuire had not suffered cognizable damages.

Stunich did not appear at the November 2014 case management conference. Another conference was set for February 2015. Stunich appeared but advised the court of his intent to withdraw from the case with McGuire's consent. The next conference was set for May 2015. Stunich appeared for McGuire, but requested a 90-day continuance, which the court granted.

The continued hearing was set for August 2015. Both sides filed conference statements. Lenders reported they made an offer to settle the case, which was not accepted. McGuire filed a pro per case management conference statement and requested a fee waiver notwithstanding that Stunich was still his attorney of record. McGuire reported that his case was not ready to set for trial because his "retained counsel . . . did not perform" and he needed additional time to review the file, seek competent counsel and draft an amended pleading.

At the August 2015 hearing, Stunich appeared with McGuire. According to the minute order for the hearing, the Lenders' requested a continuance, which was granted without objection. Stunich reiterated his intent to withdraw, and "[t]he Court advise[d] the Plaintiff of the status of the case." The matter was continued until November 2015.

In September 2015, Lenders filed a demurrer to the third amended complaint. A hearing on the demurrer was set for October 16. On October 6, Lenders filed a notice that they did not receive opposition to the demurrer. On October 13, McGuire filed a pro per opposition and request for leave to file a fourth amended complaint, a copy of which he attached to his brief. McGuire's opposition brief was an unsworn declaration listing several complaints. McGuire stated that he was advised at the prior hearing that he had 90 days to file a fourth amended complaint, but when he went to file his pleading he was informed for the first time that a demurrer hearing had been scheduled on the third amended complaint. McGuire complained that he did not receive notice of the demurrer or a "statement from counsel as to the status of the proceedings." However, he also admitted that the court did not have his correct address and acknowledged that he did receive copies of some documents from his "former" attorney. Finally, he complained he had been denied the effective assistance of counsel and that the failure to file a timely opposition to Lenders' demurrer was excusable neglect.

McGuire appeared without Stunich at the October 16, 2015 hearing on Lenders' demurrer and reported that Stunich no longer represented him. The court noted that Stunich had not filed a motion to withdraw and continued the hearing so that McGuire could "consult" with Stunich.

C. McGuire's Resumption of Pro Per Status

On October 22, 2015, McGuire filed a substitution of attorney removing Stunich as his attorney of record and indicating that he would represent himself. The following day, McGuire appeared in court in pro per and opposed the pending demurrer. On December 2, 2015, the court partially sustained and partially overruled the demurrer.

On December 10, 2015, Lenders answered the third amended complaint. Later that month, McGuire filed a fourth amended complaint, which triggered another round of motions. In 2016, McGuire filed a demurrer to the Lenders' answer, which the trial court denied, and opposed the Lenders' motion to strike the fourth amended complaint, which the court granted without prejudice to filing a properly noticed motion for leave to amend.

On December 22, 2016, McGuire filed a motion for leave to file a fourth amended complaint. In a supporting declaration, McGuire stated that he felt that Stunich omitted pertinent facts from the third amended complaint. McGuire also complained that after Stunich filed the third amended complaint, he ceased his representation, stopped communicating with McGuire and then failed to withdraw from the case in a timely manner. Finally, McGuire complained that he had struggled to represent himself because he was unfamiliar with procedural rules and had notice problems resulting from confusion about his Post Office Box address.

D. McGuire's Representation by Timothy Gray

At a February 15, 2017 hearing on McGuire's motion for leave to file a fourth amended complaint, attorney Timothy Gray "specially appear[ed]" with McGuire. The matter was continued because the court was not provided with the file. At the continued hearing on February 28, Gray argued successfully on behalf of McGuire, whose motion for leave to amend was granted.

In March 2017, Lenders filed a motion to dismiss this action because it had not been brought to trial within five years of its commencement. (§§ 583.310 & 583.360.)

On April 3, 2017, Gray filed a substitution of attorney, identifying himself as the new legal representative for McGuire, who would no longer be acting in pro per. That

same day, Gray filed McGuire's opposition to the motion to dismiss. On April 28, the court held a hearing on the motion to dismiss and then took the matter under submission.

On July 6, 2017, the court filed an order granting the Lenders' motion. The court concluded that dismissal was mandatory because the statutory five-year period for bringing a case to trial had expired. In reaching this conclusion, the court recognized that time periods may be excluded from the five-year calculation based upon a proper showing, but found that once the five-year period has elapsed, the defendant has an absolute right to dismissal. (Citing §§ 583.340, 583.360; *M&R Properties v. Thomson* (1992) 11 Cal.App.4th 899, 903.) McGuire had claimed that the five-year clock was tolled during his case because Stunich abandoned him but failed to withdraw as his counsel, thus making it "impossible, impracticable, or futile" to bring this action to trial during most of the time that Stunich was McGuire's counsel of record. The court rejected this claim, finding that (1) the evidence did not show that Stunich engaged in " 'positive misconduct,' " and (2) if Stunich was guilty of inexcusable neglect, McGuire's remedy was a malpractice action. (Citing *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898–899 (*Carroll*).)[3]

III. Discussion

"To avoid dismissal under the section 583.340, subdivision (c) exception, a plaintiff must prove (1) a circumstance establishing impossibility, impracticability, or futility, (2) a causal connection between the circumstance and the failure to move the case to trial within the five-year period, and (3) that [he or] she was reasonably diligent in prosecuting [his or] her case at all stages in the proceedings." (*Tanguilig, supra*, 22 Cal.App.5th at p. 323.)

Here, McGuire contends that the impossible circumstance causing the failure to move his case toward trial was Stunich's abandonment during a period he was duty

[3] McGuire also argued that the five-year clock did not run while McGuire's bankruptcy petition was pending. Rejecting this claim, the court observed that its jurisdiction was not suspended by the plaintiff's filing of a bankruptcy petition. (See *Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 164.)

bound to represent McGuire. According to this theory, Stunich did not do any work on behalf of McGuire after he filed the third amended complaint on July 19, 2013, and, therefore, the five-year period was tolled from that date until October 22, 2015, when McGuire filed a substitution of attorney removing Stunich as his counsel of record. Thus, McGuire posits, the trial court erred by dismissing his action because the five-year period had not expired.

In presenting this claim of error, McGuire acknowledges the general rule that an attorney's negligent failure to prosecute an action is imputed to his client. (*Carroll, supra,* 32 Cal.3d at p. 898.) He contends, however, that his case falls within a settled exception to this general rule, which applies when the attorney has engaged in "positive misconduct," while the client remained relatively free of negligence. (*Ibid*.)

Lenders question whether this exception applies to dismissals under section 583.310, pointing out that all of the positive misconduct cases that McGuire cites were decided under section 473. (See *Carroll*, *supra*, 32 Cal.3d 892; *Buckert v. Briggs* (1971) 15 Cal.App.3d 296; *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674.) Although *Carroll* and its progeny were decided under section 473, they apply principles that have broader implications. Section 473, subdivision (b) authorizes a court to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The reason that *inexcusable* delay in prosecuting a case is not a ground for relief from default under section 473 is that an attorney's negligence is imputed to his or her client, who can seek redress through an action for legal malpractice. (*Carroll*, *supra*, 32 Cal.3d at p. 898.) However, as explained in *Carroll*, courts have found that when the attorney's conduct is qualitatively more egregious than malpractice, amounting to "a total failure on the part of counsel to represent the client," such that the attorney has in effect "de facto substituted himself out of the case," then it would be "unconscionable to apply the general rule charging the client with the attorney's neglect." (*Id.* at p. 900.)

We have not found authority addressing whether this type of misconduct by an attorney can be a circumstance making it impossible for the client to move a case toward trial within five years. However, our independent research shows that positive misconduct amounting to total abandonment is a recognized defense to a motion seeking discretionary dismissal of an action under section 583.420 for delay in prosecution. (*Freedman v. Pacific Gas & Electric Co*. (1987) 196 Cal.App.3d 696; *Fleming v. Gallegos* (1994) 23 Cal.App.4th 68; *Seacall Development, LTD v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201.) Discretionary dismissals do not implicate precisely the same policies attendant to the mandatory five-year statutory deadline. Ultimately though, we are concerned with the section 583.340, subdivision (c) exception to that mandatory deadline, which balances competing policies by making allowances for circumstances that are beyond the plaintiff's control. Therefore, we assume for purposes of this appeal that positive misconduct by an attorney, which amounts to abandonment of a client who is otherwise free of blame can be a circumstance establishing that it was impossible for the client to bring his case to trial within the statutory period.

As our Supreme Court has explained, this positive misconduct theory "is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, and for this reason his negligence should not be imputed to the client.' " (*Carroll, supra,* 32 Cal.3d at p. 898, italics omitted.) Subsequent courts have clarified that for the exception to apply, "the attorney's misconduct must be sufficiently gross to effectively abrogate the attorney-client relationship, thereby leaving the client essentially unrepresented at a critical juncture in the litigation." (*Garcia v. Hejmadi, supra,* 58 Cal.App.4th at pp. 682–683.) The exception is necessarily narrow because when " ' "inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law." ' " (*Freedman v. Pacific Gas & Electric Co., supra,* 196 Cal.App.3d at p. 706.)

Here, McGuire contends that Stunich engaged in egregious misconduct by failing to do any work in this case after filing the third amended complaint on July 19, 2013. This serious charge is unsupported by concrete evidence. Instead, McGuire assumes that

because Stunich did not file a pleading or motion after July 19, 2013, he did not do any subsequent work. However, an attorney's representation is not limited to the court documents that he files. Furthermore, McGuire does not consider what the documents in his court file actually say, ignoring references to developments that occurred after the third amended complaint was filed, including the foreclosure of McGuire's properties; the exchange of discovery; and settlements with some defendants. The record also shows that in 2015, while Stunich was still McGuire's counsel of record, Lenders made a settlement offer, which was not accepted. This evidence supports the conclusion that Stunich did continue to represent McGuire after the third amended complaint was filed.

McGuire tries to shore up his claim by contending that "[t]he main, specific instance showing attorney abandonment, was Attorney Stunich's refusal to file an Opposition to [Lenders'] Demurrer filed September 14, 2015." McGuire argues that this refusal constituted positive misconduct, which obliterated the attorney-client relationship, because defeating the Lenders' demurrer was critical to McGuire's case. Thus, as a consequence of Stunich's inaction, McGuire was "effectually and unknowingly" deprived of representation. Again, McGuire's version of the facts is not grounded in the record.

First, the record shows only that Stunich did not file an opposition to the demurrer, which does not necessarily mean that he refused to do so. Indeed, the record does not foreclose the possibility that McGuire instructed Stunich not to file that brief. McGuire's assumption that Stunich's inaction constituted positive misconduct violates the fundamental rule of appellate procedure that a judgment is presumed correct and that prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Second, even if Stunich did not have an excuse for his inaction, this decision would nevertheless be imputed to McGuire absent proof that he was relatively free of blame. Here, McGuire contends that he did not know he had been "deprived of representation" until he discovered that Stunich did not oppose Lenders' demurrer in October 2015. However, this contention is flatly contradicted by record evidence that: in May 2014, even the defendants were aware of communication problems between

McGuire and Stunich; at least by February 2015, Stunich and McGuire agreed that Stunich would withdraw from the case; in August 2015, McGuire began making pro per filings even though he was still technically represented by Stunich; and in August 2015, McGuire appeared at the hearing where Stunich announced in open court that he intended to withdraw from the case. These events all occurred before Lenders even filed their demurrer to the third amended complaint.

For all these reasons, McGuire has failed to establish that his former counsel's allegedly negligent failure to prosecute this case is excepted from the general rule that an attorney's inexcusable neglect is imputed to his client. Therefore, the fact that Stunich was McGuire's counsel of record for several months was not a circumstance establishing impossibility, impracticability, or futility within the meaning of the section 583.340, subdivision (c) exception.

Nor has McGuire satisfied either of the other two requirements for tolling the five-year period under section 583.340, subdivision (c), which we delineated at the outset of our discussion. As noted, there must be a causal connection between the circumstance establishing impossibility and the failure to bring the case to trial within five-years. (*Tanquilig*, *supra*, 22 Cal.App.5th at p. 323.) Here, McGuire attempts to establish that causal link by claiming that it was impossible to bring his case to trial for most of the time that Stunich was his counsel of record. However, McGuire identified only one concrete instance of alleged misconduct by Stunich—the failure to file an opposition brief in October 2015, which was the same month that Stunich withdrew from this case. Furthermore, as noted in our background summary, McGuire himself filed an opposition brief, which the trial court considered in ruling on the Lenders' demurrer. Thus, even if Stunich's failure to oppose the demurrer could be characterized as positive misconduct, it did not cause any delay in moving this case toward trial during the five year statutory period.

Finally, McGuire did not establish that he was reasonably diligent in prosecuting this case at all stages of the proceeding, the third independent requirement for avoiding dismissal under the section 583.340, subdivision (c) exception. (*Tanguilig*, *supra*,

22 Cal.App.5th at p. 323.) After McGuire removed Stunich as his counsel of record, he had approximately 16 months to bring his case to trial and, during part of that time he had assistance from attorney Gray. The trial court found that during this period McGuire took no "specific efforts to bring this case to trial." McGuire disputes this finding, arguing that he acted with due diligence by pursuing his right to file a fourth amended complaint even as he ran up against the five-year deadline. McGuire does not explain why this strategy was reasonably diligent or otherwise demonstrate that the trial court abused its discretion by finding that it was not.

IV. DISPOSITION

The judgment is affirmed. Lenders are awarded costs on appeal.

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Tucher, Acting P.J.

We concur:

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Reardon, J.*

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Lee, J.**

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Judge of the Superior Court of California, City and County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.